

1 KEVIN A. DARBY, ESQ. (#7670)
2 TRICIA M. DARBY, ESQ. (#7956)
3 DARBY LAW PRACTICE, LTD.
4 4777 Caughlin Parkway
5 Reno, Nevada 89519
6 Tel. 775.322.1237
7 Fax 775.996.7290
8 kevin@darbylawpractice.com
9 tricia@darbylawpractice.com

10 Attorney for Debtors

11 **UNITED STATES BANKRUPTCY COURT**
12 **DISTRICT OF NEVADA**

13 In re:

CASE NO. BK-N-09-54025-gwz
Chapter 13

14 ROB E. LEWIS and
15 RENE E. LEWIS,

16 Debtors.

**MOTION TO VALUE COLLATERAL AND
MODIFY AND RECLASSIFY SECOND
MORTGAGE AS GENERAL UNSECURED
CLAIM PURSUANT TO 11 U.S.C. §§ 506(a)
AND 1322**

Hearing Date: April 9, 2010
Hearing Time: 2:00 p.m.

17 _____
18 Debtors ROB E. LEWIS and RENE E. LEWIS, by and through their attorney, DARBY LAW
19 PRACTICE, LTD. hereby move this Court for an order establishing the value of real property
20 collateral located at 190 Hardie Lane, Smith, Nevada 89430, securing the certain second mortgage
21 lien held by Wells Fargo Bank (“Wells Fargo”) and for an order modifying that mortgage lien claim
22 by stripping off the lien and reclassifying and rendering the entire claim a general unsecured claim in
23 this bankruptcy matter.

24 This Motion is made pursuant to 11 U.S.C. §§ 506(a) and 1322, and Federal Rules of
25 Bankruptcy Procedure (“FRBP”) 3012 and 9014, and is supported by the Declaration of Debtors and
26 the following points and authorities.
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POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

1. On November 11, 2009 (the "Petition Date"), the above-named Debtors filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code.

2. On the Petition Date, Debtors owned real property located at 190 Hardie Lane, Smith, Nevada Reno, Nevada 89523 valued at \$280,000.00 (the "Hardie Property"). *See* Declaration of Debtors.

3. As of the Petition Date, the Hardie Property was subject to first deed of trust securing a first mortgage held by Wells Fargo Home Mortgage (the "Wells Fargo First Mortgage") in the amount of \$297,000.00.

4. As of the Petition Date, no equity existed in the Hardie Property above the Wells Fargo First Mortgage.

5. Also, as of the Petition Date, the Hardie Property was subject to a second priority deed of trust securing a second mortgage held by Wells Fargo Bank in the amount of \$81,575.00 (the "Wells Fargo Second Mortgage"). However, due to the \$280,000.00 value of the Hardie Property and the superior priority of the \$297,000.00 Wells Fargo First Mortgage, the Wells Fargo Second Mortgage is wholly unsecured. The Wells Fargo Second Mortgage would receive nothing upon a liquidation of the Hardie Property for the fair market value.

II. LEGAL DISCUSSION

THE WELLS FARGO SECOND MORTGAGE SHOULD BE AVOIDED AND RECLASSIFIED BECAUSE IT IS UNSECURED AND WOULD RECEIVE NOTHING IN A LIQUIDATION

Pursuant to 11 U.S.C. § 506(a), an allowed claim is only a secured claim to extent of the value of creditor's interest in subject collateral, and is an unsecured claim to extent amount of claim

1 exceeds that value. In this regard, Federal Rule of Bankruptcy Procedure Rule 3012 provides that
 2 this Court may determine the value of a claim secured by a lien on property in which the estate has an
 3 interest on motion of any party in interest and after a hearing on notice to the holder of the secured
 4 claim.

5 The Ninth Circuit Court of Appeals has confirmed that a wholly unsecured lien may be
 6 avoided entirely and reclassified as a general unsecured claim pursuant to 11 U.S.C. 506 (a).
 7 Specifically, the Court of Appeals in Zimmer explained:
 8

9 Section 506(a) divides creditor's claims into "secured claims" and
 10 "unsecured claims." Although the conventional interpretation of
 11 "secured" might include any claim in which the creditor has a security
 12 interest in the debtor's property, 506(a) makes clear that the status of a
 13 claim depends on the valuation of the property... To put it more simply,
 14 a claim such as a mortgage is not a "secured claim" to the extent that it
 15 exceeds the value of the property that secures it. Under the Bankruptcy
 16 Code, "secured claim" is thus a team of art; not every claim that is
 17 secured by a lien on property will be considered a "secured claim."
 18 Here, it is plain that PSB Lending's claim for the repayment of its loan
 19 is an unsecured claim, because its deed of trust is junior to the first deed
 20 of trust, and the value of the loan secured by the first deed of trust is
 21 greater than the value of the house.

22 In re Zimmer, 313 F.3d 1220, 1223 (9th Cir. Cal. 2002).

23 To effectuate the principles of 11 U.S.C. §506(a), 11 U.S.C. §1322(b)(2) provides that a
 24 Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only
 25 by a security interest in real property that is the debtor's principal residence" The Supreme Court
 26 has held that this provision prohibits the strip *down* of a *partially* secured lien which secures a claim
 27 whose only security is a lien on the debtor's principal residence. See Nobelman v. American Sav.
 28 Bank, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993). However, as detailed above, the Ninth
 Circuit held in Zimmer that § 1322(b)(2) does not prevent strip *off* of a *wholly* unsecured lien. Zimmer,
 313 F.3d at 1223.

1 In the present case, the Debtors believe the Hardie Property is worth \$280,000.00. It is well
2 settled that an owner's opinion is admissible in determining the value of real estate or personal
3 property. *See, e.g., Kestenbaum v. Falstaff Brewing Corp.*, 514 F2d 690 (5th Cir. 1975); *Justice v.*
4 *Pennzoil Co.*, 598 F2d 1339 (4th Cir. 1979).

5 As established through Debtors' opinion of value, the Wells Fargo Second Mortgage is
6 wholly unsecured and, therefore, does not qualify as a secured debt under 11 U.S.C. § 506(a).
7 Specifically, the \$297,000.00 Wells Fargo First Mortgage exceeds the \$280,000.00 value of the
8 Hardie Property leaving no value or equity available to secure the Wells Fargo Second Mortgage. As
9 a result, the Wells Fargo Second Mortgage should be reclassified as a general unsecured claim to
10 receive pro rata with other general unsecured creditors, as proposed in Debtors' Chapter 13 Plan filed
11 herein. In addition, the Wells Fargo Second Mortgage should be removed and stripped from the
12 Hardie Property negating and nullifying any right or interest as a secured creditor under state law.
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15 III. CONCLUSION

16 Based on the above points and authorities, the Debtors respectfully request the following
17 relief:
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19 1. That this Court exercise its authority under Fed. R. Bankr. P. 3012 to determine
20 and establish that the value of the Hardie Property is \$280,000.00;

21 2. That this Court find pursuant to 11 U.S.C. §506(a) that the Wells Fargo Second
22 Mortgage is not a secured claim in this Case;

23 3. That this Court find the Wells Fargo Second Mortgage may be modified and
24 reclassified as a general unsecured claim and that any purported security interest or rights of the
25 Wells Fargo Second Mortgage in the Hardie Property be avoided, nullified and negated, as proposed
26 in Debtors' Chapter 13 Plan and as authorized by 11 U.S.C. §§ 506(a) and 1322(b); and
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4. That this Court provided for any such other relief deemed appropriate.
DATED this 2nd day of March, 2010.

DARBY LAW PRACTICE, LTD.

/s/ Kevin A. Darby
By: _____
KEVIN A. DARBY, ESQ. (#7670)
TRICIA M. DARBY, ESQ. (#7956)
DARBY LAW PRACTICE, LTD.
4777 Caughlin Parkway
Reno, Nevada 89519